AZLAN SHAH AHMAD

v.

KEWANGAN BERSATU BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-293-2000]
14 DECEMBER 2000

CIVIL PROCEDURE: *Time - Extension of time - Application for leave to file record of appeal out of time - Whether respondent prejudiced by application - Whether allowed*

CIVIL PROCEDURE: *Solicitor - Change of solicitor - Delay in application for leave to file record of appeal - Whether a genuine mistake on part of solicitor - Whether sufficient for grant of extension of time - Whether respondent prejudiced by delay*

This was an application by the defendant/appellant for leave to file a record of appeal out of time. The facts were that the plaintiff had obtained a summary judgment against the appellant on 21 June 2000 at the sessions court. The appellant filed a notice of appeal against the decision of the sessions court within time. The time to file a record of appeal was before 25 July 2000. However the appellant only filed the record of appeal on 7 August 2000.

Held:

[1] The reason given for the delay was that the appellant's counsel, one Abdul Rahman, who was in charge of the appellant's case had resigned on 30 June 2000 and it was one month later a new legal assistant for litigation joined the legal firm. Therefore there was a change in circumstances. For the whole month of July 2000, there was no legal assistant to take over the conduct of the matter and this had accordingly affected the general care and conduct of the appellant's case. Thus the delay in filing the record of appeal was a genuine mistake on the part of the solicitor. (pp 374 f-h & 375 a)

[2] Since the appellant served his notice of appeal on the respondent on 4 July 2000, the respondent had notice and knew at all times that the judgment and order dated 21 June 2000 was being appealed against. Therefore the respondent was not prejudiced by the delay on the part of the appellant in filing his record of appeal. Further, the sealed judgment and order dated 21 June 2000 had been received by the appellant only on 23 November 2000. Thus the respondent was not prejudiced at all by the appellant's application for extension of time. (p 377 b-d)

[Appeal allowed.]

Case(s) referred to:
Gatti v. Shoosmith [1939] 3 All ER 916 ***(refd)***
Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 ***(refd)***
Sinnathamby & Anor v. Lee Chooi Ying [1987] 1 MLJ 110 ***(refd)***
Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 8(1)
Subordinate Court Rules 1980, O. 29 r. 9(1)

For the defendant - Mohd Lusfi (Helmi Omar); M/s Yacob Mat Yim & Rakan-rakan
For the plaintiff - Andy Khan (Abdul Rahim); M/s Edlin Ghazaly & Rahim

Reported by Suhainah Wahiduddin

JUDGMENT

Faiza Thamby Chik J:
This is an application by the defendant/appellant *vide* notice of motion dated 26 August 2000 for leave to file record of appeal out of time supported by an affidavit affirmed by Azlan Shah Ahmad on 25 August 2000. The plaintiff obtained a summary judgment against the appellant at the sessions court on 21 June 2000. The appellant filed a notice of appeal against the decision of the sessions court within time on 4 July 2000. The time to file a record of appeal was before 25 July 2000. However, the appellant only filed the record of appeal on 7 August 2000 which is out of time. The length of the delay in filing the record of appeal was 12 days. Hence this application is made for leave to file the record of appeal out of time. It is noted that the reason given for the delay in filing the record of appeal was that the appellant's counsel, Abdul Rahman Kamaruddin, who was in charge of the appellant's case had resigned from Messrs Yacob Mat Yim & Rakan-rakan. The said counsel resigned on 30 June 2000. It was one month later a new legal assistant for litigation joined the legal firm. The latter joined the legal firm on 1 August 2000.

Therefore there is a change of circumstances. For the whole month of July, 2000 there was no legal assistant to take over the conduct of the matter and had thus affected the general care and conduct of the appellant's case. Those facts led to the delay in filing the appellant's record of appeal which was only filed on 7 August 2000 after receiving the draft judgment and draft order dated 21 June 2000 for approval from the respondent on 31 July 2000.

I think for the above stated reasons, the delay in filing the record of appeal is a genuine mistake on the part of the solicitor. A mistake of a solicitor as a ground for the court to grant an extension of time was considered in the case of *Gatti v. Shoosmith* [1939] 3 All ER 916. In that case the applicant was applying for extension of time to appeal. He was a few days late and the reason for the delay was the mistake of the solicitor. The English Court of Appeal allowed the extension of time and leave to appeal was given although the delay was due to the mistake of the solicitor. Our courts also had considered a mistake of the solicitor in granting extension of time. The case of *Sinnathamby & Anor v. Lee Chooi Ying* [1987] 1 MLJ 110 is a Malaysian case where the Supreme Court considered that a mistake of the solicitor is a factor to be taken into consideration when deciding to exercise its discretion to extend the time. At p. 112 the Supreme Court stated:

> Under rule 13 of the repealed Federal Court (Civil Appeals) (Transitional) Rules 1963, "special leave" of the full court was required to bring an appeal out of time, but under the present rule. 56 of the Rules of the Supreme Court 1980 the word "special" has been omitted, and because of this change in the law which requires only ordinary leave, it is argued that the mistake of a legal adviser is no longer a ground for refusing an application for extension of time to appeal. In my view this is not so, for the effect of the change in the law merely widens the court's unfettered discretion under rule. 56. In exercising its discretion, the court would *inter alia* consider the reason for the delay, the length of the delay and the likelihood of prejudice to the successful party in the court below. In view of the change in the law which no longer requires "special leave", where the mistake of legal adviser is advanced as the reason for the delay, the Court is now free to consider it on its merits in the same manner that the court would exercise its discretion in other cases. Thus the ruling in *Re Coles & Ravenshear* and as well as *Chong Kueng Ying & Ors. v. Lovis Lavagna* which excluded the court's discretion in cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980. For the purpose of rule. 56, this court should be guided by the principle adopted by the Court of Appeal in England after the 1909 amendment of the English RSC as to extension of time for appeal. In *Gatti v. Shosmith*, the Court of Appeal allowed extension of time where the delay was only a matter of a few days and the appellants' solicitor, within time, had informed the respondent's solicitors by letter of their intention to appeal. On the facts of that case, although the notice of appeal was not served within the strict time, due to the appellants' solicitor misunderstanding of the law, the court exercised its discretion in granting leave to appeal out of time. But *Gatti*'s case is no authority for the proposition that because of the change in the law from special to ordinary leave, the court has no more discretion to refuse an application under rule. 456 where the delay is caused by the mistake of a legal adviser. This is made clear in the judgment of Sir Wilfrid Greene MR at page 919 where he said:

> On consideration of the whole matter, in my opinion under the rule as it now stands the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser may be a sufficient cause to justify the court in exercising its discretion. I say "may be" because it is not to be thought that it will necessarily be exercised in every set of facts.

The case of *Sinnathamby & Anor v. Lee Chooi Ying & Anor* was followed in the case of *Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 where the court in dealing with an application for extension of time to appeal against the stay of execution after a lapse of nearly 1 1/2 years also held that the ruling which excluded the court's discretion in cases where the delay was caused by the mistake of the legal advisor should no longer be applicable after the coming into force of the Rules of the Supreme Court 1980. Chong Siew Fay J (as he then was) said:

> (2) In exercising its discretion, the court would normally consider the reasons for the delay, the length of the delay, the chances of the appeal succeeding if time for appealing was extended and the likelihood of prejudice to the successful party in the court below. On the facts and the circumstances of the present case, the delay, though of some considerable time, had been reasonably explained and was also shown to be connected to steps taken in relation to the order of the SAR now intended to be appealed against.

In *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628 the Court of Appeal dismissed an application for extension of time to file the record of appeal because no reasonable and acceptable explanation had been given for the four weeks delay. The only reason given for the delay is that a new clerk had taken over the conduct of the file and it was then discovered that no request for extension had been made under Practice Direction 2/91. I think the case of *Yeo Yoo Teik* is different from the appellant's case here. In the instant case the appellant's counsel left the legal firm and it was not until a month later a new counsel joined and took over the conduct of the matter. The delay in filing the record of appeal is thus reasonably explained due to this genuine change of circumstances and this explanation I am of the view is not an afterthought. The draft judgment and draft order dated 21 June 2000 which is appealed against was received by the appellant for approval on 31 July 2000, six days after the lapse of time to file the record of appeal. The draft judgment and draft order dated 21 June 2000 is necessary to be included in the appellant's record of appeal. I think the fact that the draft judgment and draft order was received after the expiry of the time to file the record of appeal is a factor to be considered. Under O. 29 r. 9(1) Subordinate Court Rules (see also O. 42 r. 8(1) Rules of the High Court) the preparation of judgment or order is described as follows:

8(1) Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the Draft shall be submitted for approval to the solicitors (if any) of the other party ... .

Since the appellant served his notice of appeal on the respondent on 4 July 2000, the respondent had notice and knew at all times that the judgment and order dated 21 June 2000 was being appealed against. Therefore the respondent was not prejudiced by the delay on the part of the appellant in filing his Record of Appeal. The judgment and order of the sessions court dated 21 June 2000 was not yet sealed nor served on the appellant at the time of the application for extension of time was filed by the appellant. If there was a sealed judgment and order served on the appellant but no record of appeal was filed within the stipulated three weeks time frame, the existence of prejudice to the respondent would be very well understood. However this is not the situation here. It is observed that the sealed judgment and order dated 21 June 2000 had been received by the appellant only on 23 November 2000. Therefore the respondent is not prejudiced at all by the appellant's application for extension of time.

In addition thereto I observed that the respondent in their affidavit (see para. 7 of the affidavit affirmed by Roslan bin Abu Kassim on 25 October 2000) had clearly refused to accept any discussion on the merits of the appellant's case. Consequently if the appellant makes no mention of the factual circumstances to show the merits of his case such omission does not affect the appellant's application for extension of time and hence does not prejudice the respondent in any way. For the reasons set out above I allow the appeal.